Supreme Court, U.S.
FILED

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KENNETH R. FOX,
Petitioner,

v.

WENDY R. FOX,
Respondent.

Petition for a Writ of Certiorari to the Maryland Court of Special Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State may, consistent with due process of law, enroll a foreign judgment against a party who was barred from cross examining witnesses, offering evidence, filing motions, or filing pleadings, or otherwise participating in the foreign proceeding as a sanction for a failure to appear personally contrary to this Court's decision in *Degen v. United States,* 517 U.S. 820 (1996).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Maryland Court of Special Appeals (App. A, 1a) is unreported. The opinion of the Maryland Court of Appeals denying certiorari (App. B, 7a) and the opinion of the Circuit Court for Montgomery County, Maryland (App. C, 8a) are also unreported. The opinion of the Circuit Court for Arlington County, Virginia, entering the judgment enrolled by the decisions below (App. G, 35a) is unreported, as well is the opinion of the Virginia Court of Appeals affirming that judgment (App. E, 29a).

JURISDICTION

The Maryland Court of Special Appeals issued the opinion below on May 28, 1998, and the Maryland Court of Appeals denied a petition for certiorari on September 15, 1998. This Court has jurisdiction over the petition under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 14, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT

This case presents an important question of constitutional law: whether a State (here Maryland) may enroll a foreign judgment (here a Virginia judgment) against a party who has been barred from participating in the foreign proceeding as a sanction for failing to appear personally. The decision below, which enrolled such a foreign judgment, violates fundamental and well-established principals of due process.

On April 9, 1997, the Circuit Court for Arlington County, Virginia ("Virginia Trial Court") in *Kenneth R. Fox v. Wendy R. Fox,* Chancery No. 96-80 ("Virginia Proceeding") entered a judgment ("Virginia Judgment") awarding Respondent Wendy R. Fox a divorce, custody of two minor children, a protective order, indefinite alimony, a monetary award, a money judgment for child support, and a *writ of ne exeat preventing Petitioner from leaving Virginia.* App. G, 43a-47a.

In the Virginia Proceeding leading to entry of the Virginia Judgment, the Virginia Trial Court ruled on August 16, 1996 (as memorialized in an Order entered September 6, 1997), that:

> "Kenneth Fox shall not file any motions or pleadings in this Court until such time as he personally appears before this Court."

App. H, 49a-50a.

At the commencement of the divorce trial in the Virginia Trial Court on April 7, 1997, counsel of record for Petitioner [Mr. Garver] and the Virginia trial judge had the following exchanges, as a consequence of which the Virginia Trial Court continued transforming what was supposed to be an adversary proceeding into an *ex parte* proceeding:

> "MR. GARVER: Your Honor, may I ask you, it's my understanding that my objection is continuing on the grounds set forth before?
>
> "THE COURT: Yes, sir.
>
> "MR. GARVER: And do I also understand that I am prohibited from making proffers to the Court?
>
> "THE COURT: Yes, sir.

App. F, 31a.

* * * *

> "MR. GARVER: Just to clarify, it's my understanding we are prohibited from objecting throughout?
>
> "THE COURT: You have no standing. One objection now that you have already made covers everything. All you should do is make yourself comfortable and listen. Unless Mr. Fox shows up, then by all means we can change the rules. But until he does, you can be seen and not heard."

App. F, 33a-34a.

On April 21, 1997, Respondent filed a request in the Circuit Court for Montgomery County ("Maryland Trial Court") asking that the Virginia Judgment be enrolled as a foreign judgment. On May 13, 1997, Petitioner filed

a Motion To Strike And/Or To Vacate Foreign Judgment in which he asserted, *inter alia,* that the Virginia Judgment was void for lack of due process of law in the Virginia Proceeding. Specifically, *and the facts are not in dispute,* Petitioner argued in the Maryland Trial Court that beginning August 16, 1996 and continuing through to the entry of the Virginia Judgment on April 9, 1997, the Virginia Trial Court totally denied Petitioner's counsel of record, and therefore denied Petitioner, the right to (1) *to cross-examine witnesses,* (2) present evidence or proffer testimony, (3) make objections, and (4) to file or argue motions or pleadings. After a hearing held September 11, 1997, the Maryland Trial Court denied Petitioner's Motion; thereafter, Petitioner's Motion To Alter Or Amend A Judgment—Court Decision was denied by the Maryland Trial Court by an order entered October 20, 1997. App. C, 8a.

Prior to the decision below by the Maryland Court Of Special Appeals, the Court Of Appeals Of Virginia had already disposed of Petitioner's due process challenge stating as follows:

> "We find no error in the trial court's requiring Dr. Fox to appear personally prior to permitting him to proceed further." App. D, 17a-19a.

In the Maryland Court Of Special Appeals, Petitioner's due process challenge to the Virginia Judgment was summarily denied by reliance on the decision of the Court Of Appeals Of Virginia. The Maryland Court of Appeals stated:

> "We find the appellee's contentions on cross-appeal equally without merit. All of the arguments raised by the appellee in the instant case, challenging the due process of the original Virginia court proceeding, were addressed and decided by the Virginia Court of Appeals. We have read thoroughly and are persuaded by the correctness of the Virginia opinion." App. A, 6a.

Petitioner's Petition For Writ Of Certiorari to the Court Of Appeals Of Maryland, asserting that the Virginia Judgment was void for lack of due process of law in the Virginia Proceeding, was denied. App. B, 7a.

REASONS FOR GRANTING THE WRIT

The opinion below directly conflicts with the Court's decision in *Degen v. United States,* 517 U.S. 820 (1996), and the Court should therefore grant the petition.

In the opinion below, the Maryland Court of Special Appeals affirmed the enrollment of a foreign judgment even though in the foreign proceeding the Petitioner was denied the opportunity to offer evidence, cross-examine witnesses, file pleadings and papers, or otherwise effectively participate in the foreign proceeding as a sanction for failing to appear personally in the court.

The "non-participation sanction" created and imposed by the Virginia Trial Court clearly transformed what was an adversary divorce proceeding into an *ex parte* divorce proceeding through denying to Petitioner all his fundamental due process rights, including the right of cross-examination. In turn, and not surprisingly, the *ex parte* nature of the divorce proceeding resulted in a decision which has caused great harm to the Petitioner and others by, among other things, separating Petitioner and his two minor children, denying Petitioner by virtue of the *writ of ne exeat* his personal liberty, and denying Petitioner (a physician and surgeon) the right to practice to the detriment of his patients and his livelihood.

This Court's decision in *Degen, supra,* is dispositive of the issue of the unconstitutionality of a "non-participation sanction" such as the one imposed on the Petitioner.

This case presents, because it is one in which the conduct of the state trial court is not in dispute, an excellent vehicle by which this Court may expand the *Degen* prohibition against non-participation sanctions, such as the one imposed by the Virginia Trial Court on the Petitioner,

to state courts, placing them on notice that the imposition of a non-participation sanciton unconstitutionally denies litigants due process of law.

In *Degen,* a *civil* forfeiture action, the United States Court Of Appeals for the Ninth Circuit struck Degen's claims and entered summary judgment against Degen based on the "fugitive disentitlement doctrine" merely because Degen failed to personally appear in a separate criminal action in which he was the defendant. In reversing the Ninth Circuit this Court stated:

> "Third, of course, Degen's absence entitles him to no advantage. If his unwillingness to appear in person results in non-compliance with a legitimate order of the court respecting pleading, discovery, the presentation of evidence, or other matters, he will be exposed to the same sanctions as any other uncooperative party. A federal court has at its disposal an array of means to enforce its orders, including dismissal in an appropriate case. . . .
>
> * * * *
>
> . . . A court-made rule striking Degen's claims and entering summary judgment against him as a sanction, however, would be an arbitrary response to the conduct it is supposed to redress or discourage.
>
> The right of a citizen to defend his property against attack in a court is corollary to the plaintiff's right to sue there. *McVeigh v. United States*, 11 Wall., at 267. For this reason we have held it unconstitutional to use disentitlement similar to this as punishment for rebellion against the United States, ibid., or, in at least one instance, for contempt of court. *Hovey v. Elliott*, 167 U.S. 409, 413-414 (1897). We need not, and do not, intimate a view on whether enforcement of a disentitlement rule under proper authority would violate due process, cf. *Blackmer v. United States*, 248 U.S. 421 (1932). It remains the case, however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The

> dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits."
>
> There would be a measure of rough justice in saying Degen must take the bitter with the sweet, and participate in the District Court either for all purposes or none. But the justice would be too rough. A court's inherent power is limited by the necessity giving rise to its exercise. There was no necessity to justify the rule of disentitlement in this case; to strike Degen's filings and grant judgment against him would be an excessive response to the concerns here advanced." *Degen*, 116 S.Ct. 1777, 1782-1783 (1996)

In Maryland, the procedure for the domestication of foreign judgments is governed by the Uniform Enforcement Of Foreign Judgments Act, Section 11-801, et seq., Courts & Judicial Proceedings Article, Annotated Code of Maryland. Thereunder, if the enrollment of the foreign judgment is challenged, as it was by Petitioner, the trial judge must then make a preliminary determination that the judgment is entitled to full faith and credit in Maryland. *Imperial Hotel, Inc. v. Bell Atlantic Tri-Con Leasing Corp.*, 91 Md.App. 266, 272, 603 A.2d 1371 (1992).

Embodied in the United States Constitution are the fundamental principles of due process of law, including notice, right to be heard, right to counsel, and the rights to cross-examine, to challenge evidence and to present evidence. United States Constitution, Amendment 14, Section 1.

Petitioner, as had the petitioner in *Degen*, was denied fundamental due process rights merely because Petitioner did not *personally appear* in a judicial proceeding. This case presents an opportunity for the Court to expand the *Degen* holding to state courts.

The Maryland Court of Special Appeals should not have affirmed the enrollment of the Virginia Judgment

because it was an unconstitutional denial of due process of law for the Virginia Trial Court to impose what it termed a "non-participation sanction" (i.e., "disentitlement", see page 7 of Opinion of Court of Appeals of Virginia in *Fox v. Fox* (App. D, 17a)) and thereby to deny Petitioner the right through his counsel of record to (1) *cross-examine witnesses,* (2) present evidence or proffer testimony, (3) make objections, and (4) file or argue motions or pleadings, as a sanction/punishment for Petitioner's failure to personally appear in the courtroom.

This case presents a most egregious incident of a denial of basic due process, that being the action of a trial court preventing counsel of record for a party from participating in the proceedings and relegating that counsel to the posture of being "seen and not heard".

This case arises from an underlying divorce case and is, therefore, representative of a significant portion of the civil caseload of the state courts of the Nation.

Finally, as noted above, this case is one in which the conduct of the trial is not in dispute and therefore presents an excellent vehicle to expand the *Degen* prohibition to state courts and prevent the imposition of a "non-participation sanction" and thereby to assure due process and justice.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Petitioner, pro se

APPENDICES

APPENDIX A

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1685
September Term, 1997

WENDY R. FOX

v.

KENNETH R. FOX

Moylan,
Hollander,
Getty, James S. (Ret.),
Specially Assigned),

JJ.

OPINION BY MOYLAN, J.

Filed: May 28, 1998

The appellant, Wendy R. Fox, challenges the ruling issued by Judge James L. Ryan of the Circuit for Montgomery County, whereby the court enrolled the *Findings of Fact, Conclusions of Law, Judgment of Absolute Divorce and Monetary Award* entered in the Circuit Court

for Arlington County, Virginia, but refused to enroll the writ of *ne exeat* [1] portion of the final judgment. Both the appellant and the appellee, Kenneth R. Fox, noted timely appeals. The appellant contends:

> that the trial court erred in refusing to give full faith and credit to the *Findings of Fact, Conclusions of Law, Judgment of Absolute Divorce and Monetary Award,* when it enrolled this final judgment, entered in the Circuit Court for Arlington County, Virginia, when it excluded that portion of this Virginia final judgment containing the writ of *ne exeat,* contrary to the Maryland Uniform Enforcement of Judgments Act, the United States Constitution, and the State of Maryland Constitution.

On cross-appeal, the appellee contends:

> that the trial court erred in enrolling the *Findings of Fact, Conclusions of Law, Judgment of Absolute Divorce and Monetary Award,* entered in the Circuit Court of Arlington County, Virginia.

This appeal stems from a bitter divorce battle between the parties which resulted in a final judgment being entered in favor of the appellant by Judge Benjamin N.A. Kendrick of the Circuit Court for Arlington County, Virginia, on April 9, 1997. Although in dealt with other peripheral matters, the essential judgment (the "Virginia Judgment") ordered the appellee to pay the appellant a

---

1 The writ commands the defendant to give bail in a certain sum that he will not leave the state without leave of the court, and for want of such bail that the sheriff does commit the defendant to prison. This writ is usually a part of the chancery practice in states where it is in force. It is issued to prevent debtors from escaping their creditors. It amounts to nothing more than process to hold to bail, or to compel a party to give security to abide the decree made in his case."

Bouvier's Law Dictionary.

Maryland has recognized the availability of a writ of *ne exeat* in *Jackson v. Jackson,* 15 Md. App. 615 (1972).

lump sum monetary award in the amount of $1,450,000. The court then, in response to the appellee's failure to comply with numerous court orders, included in its final judgment an amendment to the writ of *ne exeat* previously entered by the court. In doing so, the court amended the original writ of *ne exeat*:

> to increase the amount of bond which the appellee must post to $1,000,000 cash bond, so as to condition the return of sufficient marital property to this jurisdiction, and so as to satisfy the judgments entered in favor of the appellant, with all other terms of said Writ and instructions to the Sheriff to remain in full force and effect as the final order of this Court.

On April 21, 1997, the appellant filed a request, in the Circuit Court for Montgomery County, to have the April 9, 1997, Virginia Judgment enrolled as a foreign judgment pursuant to the Maryland Uniform Enforcement of Foreign Judgments Act, Md. Code (1995), Cts. & Jud. Proc. § 11-801, *et seq.* On September 11, 1997, at a hearing held before Judge Ryan, the appellant sought to enroll the writ of *ne exeat* entered by the Circuit Court of Virginia. The writ specifically directed the "sheriff [of Arlington County, Virginia], to apprehend the appellee, should he be found," and place him under a $1,000,000 cash bond, so as to condition the return of sufficient marital property to this jurisdiction, and so as to satisfy the judgments entered in favor of the appellant." When the trial court delivered its ruling from the bench the following occurred:

> [ATTORNEY FOR THE APPELLEE]: Are you enrolling only pursuant to the statute of foreign money judgment? Are you enrolling as well the writ of ne exeat?
>
> THE COURT: Oh, I am not enrolling that.

[ATTORNEY FOR THE APPELLEE]: I just wanted to make sure that we were clear in that regard, Your Honor.

THE COURT: Yes, *I am not enrolling ne exeat. I do not know how Maryland can tell somebody not to leave Virginia when they have already been told not to leave Virginia,* but that is another issue. I am enrolling the money judgment.

[ATTORNEY FOR THE APPELLANT]: Okay. But in other states this is covered under the Uniform Foreign Judgment Act, and their section—

* * * *

THE COURT: —I am going to rule the money judgment. I feel comfortable doing that. I am not sure about ne exeat.

[ATTORNEY FOR THE APPELLANT]: Well, we are concerned, Your Honor, of the protection of the—that this would be two things. There is a current outstanding protective order for Mrs. Fox and her children against Dr. Fox, number one.

Number two, he has—the writ was issued because he had been in default financially to Mrs. Fox and her children, and this was so that he—another effort to bring him before the court in Virginia, and if he were found here in Maryland, he could then be brought to Virginia to face the court there.

THE COURT: That is the part that gives me trouble. *I am not sure that under this circumstances, the violation of a Virginia order to not leave Virginia can be enforce by a sheriff here in Montgomery County.*

[ATTORNEY FOR THE APPELLANT]: I have checked with the sheriffs here—

THE COURT: Well—

[ATTORNEY FOR THE APPELLANT]: —and they would enforce it, by the way.

THE COURT: Okay, Well I'm not going to do that. I am going to rule the money judgment, ma'am.

(Emphasis supplied).

The appellant contends that the trial court erred in failing to enroll the *ne exeat* portion of the Virginia Judgment. We do not agree. In the appellant's brief and at oral argument, the appellant has consistently argued that the writ of *ne exeat* should have been enrolled because "the writ was important in order to bring the appellee before the court in Virginia if he were located in Maryland, because the appellee was in default financially to the appellant," and that "the sheriff in Maryland would enforce the writ." This argument simply does not make sense.

We agree with the trial court that a Maryland court has no authority to instruct the sheriff of Arlington County, Virginia to find and detain the appellee. The appellant only sought to enroll that portion of the foreign judgment; the appellant did not seek to have a new writ of *ne exeat* entered in Maryland. Thus, the enrolling of the enforcement method used by the Circuit Court of Virginia in this case would have no effect in Maryland. Moreover, even if the trial court had enrolled the *ne exeat* portion of the foreign judgment, that alone would not provide the sheriff in Montgomery County with the authority to detain the appellee for Virginia authorities. The writ of *ne exeat* the appellant sought to enroll was directed to the sheriff of *Arlington County, Virginia* to "apprehend the appellee, should he be found."

Furthermore, once a foreign judgment has been enrolled in Maryland under the Uniform Enforcement of Foreign Judgments Act, Md. Code (1995), Cts. & Jud. Proc. § 11-801, *et seq.*, it is just as if the case had been decided in a Maryland court in the first instance. Section 11-802(b) specifically provides that:

> [a] filed foreign judgment has the same effect and is subject to the same procedures, defense and proceedings for reopening, vacating, staying, *enforcing*, or satisfying as a judgment of the court in which it is filed.

Md. Code (1995), Cts. & Jud. Proc. § 11-802(b) (Emphasis supplied). Thus, the trial court's decision not to enroll the writ of *ne exeat* did not prohibit the appellant from enforcing the Maryland monetary judgment that the court enrolled here. The appellant is clearly entitled to follow any and all Maryland procedures for enforcement of money judgments. Accordingly, we find that the trial court did not err in refusing to enroll the Virginia writ of *ne exeat*.

We find the appellee's contention on cross-appeal equally without merit. All of the arguments raised by the appellee in the instant case, challenging the due process of the original Virginia court proceeding, were addressed and decided by the Virginia Court of Appeals. We have read thoroughly and are persuaded by the correctness of the Virginia opinion.

JUDGMENT AFFIRMED; COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.

APPENDIX B

IN THE COURT OF APPEALS
OF MARYLAND

Petition Docket No. 301

September Term, 1998
(No. 1685, Sept. Term, 1998,
Court of Special Appeals)

WENDY R. FOX

v.

KENNETH R. FOX

ORDER

Upon consideration of the petitions for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petitions be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

Date: Sep. 15, 1998

APPENDIX C

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil No. 168338

WENDY R. FOX,

Plaintiff,

v.

KENNETH R. FOX,

Defendant.

September 11, 1997
Rockville, Maryland

HEARING ON DEFENDANT'S MOTION TO STRIKE AND/OR VACATE FOREIGN JUDGMENT

WHEREUPON, the proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE JAMES L. RYAN, Judge

APPEARANCES:

FOR THE PLAINTIFF:

ELLEN OPPER-WEINER, Esq.
3 Bethesda Metro Center, Suite 700
Bethesda, Maryland 20814

FOR THE DEFENDANT:

DANIEL L. SHEA, Esq.
101 S. Washington Street
Rockville, Maryland 20850

* * * *

[50] RULING

THE COURT: Okay. Thanks. Well, I have considered the record that we have here in Maryland and the position of the parties and the law as I understand it.

So, far as the issue raised by Dr. Fox about the due process afforded him in the State of Virginia, an issue which is on appeal in the State of Virginia, it appeared to me from the record I have that Dr. Fox was afforded due process.

He did, I believe, get notice as evidenced by the appearance of his representative in court, and he was represented in court. The attorney was unable after a certain point to participate, but I term that for due process purposes, a default finding by the judge based on Dr. Fox's lack of cooperation or lack of obeyance, or compliance with orders to produce discoverable documents.

I do not find, even though for the purposes of this proceeding, that even though he used the word "contempt", the judge in Virginia actually found Dr. Fox in contempt.

So, having considered the whole record as it is presented, due process was not denied to Dr. Fox. So, I will deny the motion to strike the enrollment of the foreign]51[judgment.

MR. SHEA: Your Honor, may I ask for some clarification?

THE COURT: Sure. I will try.

MR. SHEA: Just so that we are all clear as to what has happened. If Your Honor looks at the actual judgment, it is attached at Exhibit No. 1 to the motion to strike, and what I am going to get out is what portion Your Honor is enrolling.

Are you enrolling only pursuant to the statute of foreign money judgment? Are you enrolling as well the writ of ne exeat?

THE COURT: Oh, I am not enrolling that.

MR. SHEA: I just wanted to make sure that we were clear in that regard, Your Honor.

THE COURT: Yes, I am not enrolling ne exeat. I do not know how Maryland can tell somebody not to leave Virginia when they have already been told not to leave Virginia, but that is another issue.

I am enrolling the money judgment.

MS. OPPER-WEINER: Okay. But in the other states, this is covered under the Uniform Foreign Judgment Act, and their section—

THE COURT: Well, but ma'am, is he here?

Ms. OPPER-WEINER: We think he has been here. Yes, indeed.

[52] THE COURT: Okay. Well—

MS. OPPER-WEINER: the

THE COURT: —I am going to rule the money judgment. I feel comfortable doing that. I am not sure about ne exeat.

MS. OPPER-WEINER: Well, we are concerned, Your Honor, of the protection of the—that this would be two things. There is a curreut outstanding protective order for Mrs. Fox and her children against Dr. Fox, number one.

Number two, he has—the writ was issued because he had been in default financially to Mrs. Fox and her children, and this was so that he—another effort to bring him before the court in Virginia, and if he were found here in Maryland, he could then be brought to Virginia to face the court there.

THE COURT: That is the part that gives me trouble. I am not sure that under this circumstance, the violation of a Virginia order to not leave Virginia can be enforced by a sheriff here in Montgomery County.

MS. OPPER-WEINER: I have checked with the sheriffs here—

THE COURT: Well—

MS. OPPER-WEINER: —and they would enforce it, by the way.

THE COURT: Okay. Well, I am not going to do that. I am going to rule the money judgment, ma'am.

[53] MR. SHEA: Thank you, Your Honor.

THE COURT: Okay.
MR. SHEA: Have a good day, Your Honor.
THE COURT: Thanks, Mr. Shea, you too.

(Whereupon, the hearing was concluded.)

[Certificate Omitted in Printing]

APPENDIX D

COURT OF APPEALS OF VIRGINIA

Present: Judges Willis, Bray and Annunziata
Argued at Alexandria, Virginia

Record No. 0721-97-4

KENNETH R. FOX

v.

WENDY R. FOX

and

Record No. 1094-97-4

KENNETH R. FOX

v.

WENDY R. FOX

From the Circuit Court of Arlington County
Benjamin N. A. Kendrick, Judge

Steven M. Garver (Cheryl G. Rice; Law Offices of Steven M. Garver, on briefs), for appellant.

Stephen A. Friedman (Denham A. Rucker; Joseph, Greenwald & Laake, P.A.; Rucker & Rucker, on brief), for appellee.

MEMORANDUM OPINION * BY
JUDGE JERE M. H. WILLIS, JR.
March 17, 1998

In this consolidated appeals from a final decree granting his wife, Wendy R. Fox, a divorce, Dr. Kenneth R. Fox contends that the trial court erred (1) by denying him due process of law, (2) by proceeding against him without proper service, (3) in determining child support, (4) in determining spousal support, (5) in determining custody and visitation, (6) in classifying marital assets and entering a monetary award thereon, (7) by exercising jurisdiction over non-parties, (8) by awarding attorneys' fees and costs, (9) by entering and amending a writ of *ne exeat*, and (10) by failing to grant a recusal motion. We affirm the judgment of the trial court.

On appeal, we review the evidence and all reasonable inferences fairly deducible therefrom in the light most favorable to the party prevailing below. *Pommerenke v. Pommerenke*, 7 Va. App. 241, 244, 372 S.E.2d 630, 631 (1988).

The parties were married on November 29, 1975. They have two minor children. On February 2, 1996, Dr. Fox filed in the trial court a bill of complaint for divorce. On February 21, 1996, Ms. Fox filed an answer and cross-bill. On April 9, 1997, the trial court dismissed Dr. Fox's bill of complaint because of his refusal to comply with discovery requests and to abide by the court's orders. The trial court granted Ms. Fox a divorce on the ground of cruelty. The final decree, *inter alia*: (1) awarded Ms. Fox custody of the parties' children; (2) continued a protective order prohibiting Dr. Fox from being in the vicinity or presence of Ms. Fox and the parties' children; (3) reserved jurisdiction to award Ms. Fox spousal support; (4) ordered Dr. Fox to pay child

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* Pursuant to Code § 17-116.010 this opinion is not designated for publication.

support of $7,505 per month; (5) awarded a lump sum monetary award to Ms. Fox in the amount of $1,450,000; and (6) found Dr. Fox in contempt for violating the trial court's orders to pay child support, spousal support, and mortgage and insurance payments on the marital residence. The trial court ordered Dr. Fox to pay Ms. Fox's attorneys' fees and costs.

I. DUE PROCESS

Dr. Fox raises numerous contentions that the trial court denied him due process of law under the Virginia and United States Constitutions. He argues that the trial court committed reversible error when it refused to allow his attorney: (1) to file or argue motions or pleadings; (2) to cross-examine witnesses; (3) to present evidence or proffer testimony; and (4) to make objections.

A. *Background*

At a hearing conducted on March 26, 1996, the trial court ordered Dr. Fox to pay monthly child support in the amount of $2,149, monthly spousal support in the amount of $5,440, and the mortgage and insurance payments on the marital residence. These rulings were memorialized in an order entered on May 3, 1996.

On May 9, 1996, the trial court issued a rule against Dr. Fox to show cause why he should not be held in contempt for his failure to pay spousal support, pursuant to its March 26 rulings.

At a hearing conducted on May 31, 1996, the trial court ordered Dr. Fox to comply with Ms. Fox's requests for discovery. That ruling was memorialized in an order entered on June 3, 1996. On July 19, 1996, the trial court ordered Dr. Fox to provide Ms. Fox with an accounting of the parties' children's trusts by July 22, 1996. The trial court also ordered Dr. Fox to respond to Ms. Fox's request for documents by August 5, 1996. Dr. Fox never produced these documents.

On August 16, 1996, Ms. Fox testified that Dr. Fox had failed: (1) to pay spousal support, (2) to provide an accounting of the parties' children's trusts, (3) to produce documents pursuant to discovery, and (4) to pay attorneys' fees, as ordered by the trial court. The trial court ordered "[t]hat Kenneth Fox present himself on the next court date for the purpose of having Kenneth Fox explain to the Court why he should not be incarcerated for his failure to pay spousal support as ordered." Dr. Fox failed to appear.

On August 27, 1996, the trial court issued a rule against Dr. Fox to show cause why he should not be held in contempt for violating the orders of the trial court and ordered him to appear in person before the trial court on September 6, 1996. Dr. Fox did not appear.

On September 6, 1996, the trial court entered an order providing that Dr. Fox "shall not file any motions or pleadings in this Court until such time as he personally appears before this Court." The trial court issued an alias rule against Dr. Fox to appear before the trial court on September 20, 1996, to show cause why he should not be held in contempt for violating the trial court's orders. Because Dr. Fox did not appear, the trial court did not permit Dr. Fox's counsel to cross-examine a witness. However, the trial court permitted Dr. Fox's counsel to offer argument and to state his objections to the orders.

Because Dr. Fox did not appear on September 20, 1996, the trial court issued a second alias rule to show cause against Dr. Fox, ordering him to appear on October 4, 1996. Counsel for Dr. Fox objected and noted his exception to this order.

The October 4, 1996 hearing was continued to October 10, 1996. Dr. Fox did not appear. At that hearing, the trial court granted custody of the parties' children to Ms. Fox, enjoined Dr. Fox from sending correspondence to the children at their school, and extended a protective order originally issued by the juvenile and domestic rela-

tions court. In response to Dr. Fox's counsel's attempt to file certain discovery documents, the following conversation ensued:

> THE COURT: Dr. Fox has at history of utter total disrepect and contempt for this Court and its orders. That's why this Court took the position that he could not—because of his track record, he could not file anything until he came before this Court and answered, in person, as to why he did or didn't do the things that are alleged that have been the basis for this Court's order and the rule to show cause.
>
> * * * *
>
> Dr. Fox is getting you to do the things that he can't do. It's a classic end run. Why doesn't Dr. Fox show up?
>
> [DR. FOX'S COUNSEL]: Well, I have told Dr. Fox that he has an obligation to appear.

On November 1, 1996, the trial court suspended Dr. Fox's continuing obligation to pay spousal support and increased child support by a like amount, to $7,589. The trial court issued a capias for Dr. Fox to show cause why he should not be held in contempt for his refusal to comply with the trial court's orders.

By its order of October 10, 1996, the trial court set November 4, 1996, as the date for the deposition of Dr. Fox and for the production of documents. On November 4, 1996, neither Dr. Fox nor his counsel appeared, and no documents were produced.

On November 15, 1996, the trial court granted Ms. Fox's motion for judgment in the amount of $24,979 for spousal support arrearages for the period between June 1, 1996 and October 18, 1996. Pursuant to its ruling at the November 1, 1996 hearing, the trial court also entered an order requiring The Scudder Funds and Signet Bank to provide statements indicating any financial assets held in trust for the parties' children Counsel for

Dr. Fox stated their objections at this hearing and noted their exceptions to the orders.

On February 7, 1997, the trial court conducted a hearing on Ms. Fox's motion for a writ of *ne exeat*. Dr. Fox did not appear, and his counsel was not permitted to participate. The trial court granted the writ, finding that sufficient cause existed to restrain the departure of Dr. Fox from the trial court's jurisdiction.

On March 7, 1997, March 21, 1997 and April 5, 1997, the trial court issued orders requesting information from Dr. Fox and non-parties concerning the identification and valuation of marital property.

On April 7, 1997, the trial court conducted an *ore tenus* hearing on the matter of the parties' divorce. Because Dr. Fox failed to appear, his counsel was not permitted to participate in the proceedings. Five witnesses, including Ms. Fox, presented testimony on the grounds for divorce. By agreement of counsel, the trial court heard testimony by proffer on the nature, identity and value of the marital assets.

On April 9, 1997, Ms. Fox mailed and sent by facsimile to all counsel of record a proposed "Findings of Fact, Conclusions of Law, Judgment of Absolute Divorce and Monetary Award." The trial court entered the final decree of divorce that day.

B.

Dr. Fox contends that the trial court unconstitutionally denied him due process. U. S. Const. amends. V, XIV; Va. Const. art. I, § 11. After reviewing the record, we hold that the trial court's imposition of the non-participation sanction against Dr. Fox comports with fundamental fairness and is consistent with due process of law.

"Notice and opportunity to be heard are fundamental requirements of due process of law." *Lockhart v. Baxter*,

12 Va. App. 600, 604, 405 S.E.2d 434, 437 (1991). Where a party has the opportunity to present testimony, but chooses not to do so, there is no denial of due process. *Venable v. Venable*, 2 Va. App. 178, 182, 342 S.E.2d 646, 649 (1986).

We find no error in the trial court's requiring Dr. Fox to appear personally prior to permitting him to proceed further. Dr. Fox asks for relief incompatible with justice. He seeks to wield the trial court's sword and shield to prosecute his claims, while simultaneously engaging in a pattern of contumacious behavior that both insults the dignity of the trial court and deprives Ms. Fox of her opportunity to fully and effectively pursue the litigation.

> Courts are invested with the power, and charged with the duty, of enforcing their decrees. Such decrees are the mandates of the law, and courts must have the power of enforcing them, if organized society is to be maintained.

Branch v. Branch, 144 Va. 244, 251-52, 132 S.E. 303, 305-06 (1926).

The trial court did not prevent Dr. Fox from cross-examining witnesses, presenting evidence, making objections, or from arguing and filing motions, pleadings and discovery. He was afforded ample notice and opportunity to do all of these things. *See Blinder, Robinson & Co., Inc. v. State Corp. Comm'n*, 227 Va. 24, 313 S.E.2d 652 (1984). Instead, he deliberately and willfully elected to ignore the trial court's repeated commands that he answer for his refusal to pay support and that he comply with discovery orders. Thus, he elected not to participate in the proceedings.

Dr. Fox held the proverbial keys for his "release" from the sanction of the trial court. That he chose not to avail himself of the means for his release does not vindicate his claim on appeal that the results were not to his liking. *See* Rule 4:12(b)(2) (sanctions for failing to make discov-

ery); *Woodbury v. Courtney*, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990) (trial court has broad discretion in determining what sanctions will be imposed upon litigant who fails to respond timely to discovery). We find no denial of due process in the proceedings.

II. SERVICE OF PROCESS

Dr. Fox contends that service upon him of the second alias rule to show cause was improper. Thus, he contends that the trial court erred in subsequently issuing a capias for him.

On August 27, 1996, the trial court issued a rule to show cause against Dr. Fox, and on September 6, 1996, it issued an alias rule. When Dr. Fox failed to appear in obedience to either rule, the trial court issued a second alias rule. A private server served the second alias rule on Dr. Fox personally in Maryland. Dr. Fox argues that this service was invalid because the certificate of return, while notarized, does not contain the server's signature. He also argues that service outside of the Commonwealth is insufficient to confer *in personam* jurisdiction in contempt proceedings. The trial court found that Dr. Fox had actual notice of the hearing noticed by the second alias rule, but failed to appear.

We need not address the validity of the service of the second alias rule. Dr. Fox did not appear, and the trial court did not proceed upon that rule. The trial court issued a capias, commanding the sheriff to seize Dr. Fox, if he was found within the sheriff's bailiwick, and to bring him before the trial court to show cause why he should not be held in contempt for failing to comply with the trial court's orders. The capias was grounded upon Dr. Fox's refusal to comply with the trial court's orders. It was not based upon the validity of the second alias rule. Accordingly, we find no error in the issuance of the capias.

III. CHILD SUPPORT

Dr. Fox contends that the trial court abused its discretion in deviating from the presumptive guideline amounts specified in Code § 20-108.2 in determining *pendente lite* and permanent child support.

> "Code § 20-107.2(2) vests discretion in the trial court in awarding child support and such awards will not be reversed on appeal unless plainly wrong or unsupported by the evidence." A rebuttable presumption exists that the amount derived from the guidelines, Code § 20-108.2, is correct. Code § 20-108.1 (B). "Once the presumptive amount is determined, the trial court may deviate . . . if such deviation is justified by factors recognized in Code §§ 20-108.1 and 20-107.2." "Whenever a child support award varies from the guidelines, Code § 20-108.2(A) requires the trial court to make written findings of fact . . . explaining why one or more of these [Code §§ 20-108.1 and 20-107.2] factors would make it 'unjust and inappropriate' to apply the guidelines to the case."

Auman v. Auman, 21 Va. App. 275, 277, 464 S.E.2d 154, 155-56 (1995) (citations omitted).

On May 3, 1996, the trial court awarded *pendente lite* child support at the level set forth in the statutory guidelines. The trial court noted at that time that a deviation would have been appropriate due to the standard of living established during the marriage and the earning capacity and resources of Dr. Fox. *See* Code § 20-108.1(B) (10 and (11). On November 1, 1996, the trial court modified the child support award due to the financial hardship placed upon Ms. Fox and the parties' minor children as a result of Dr. Fox's continued refusal to pay spousal support. This modification conformed to the prior award and suspended payment of further spousal support.

In the final decree of divorce, the trial court held that Ms. Fox was entitled to spousal support, and reserved jurisdiction to make a future spousal support award. Pending award of spousal support, the trial court ordered Dr. Fox to pay $7,050 per month in child support. The trial court considered the statutory factors set forth in Code § 20-108.1(B), and concluded that application of the statutory guidelines would be "unjust and inappropriate" under the circumstances at that time.

We find no abuse of discretion, and affirm the determination of child support.

IV. SPOUSAL SUPPORT

Dr. Fox contends that the trial court erred in setting the *pendente lite* and permanent spousal support awards. He argues that the awards are excessive.

The trial court considered the evidence and all of the statutory factors in fashioning the support awards. Its findings are supported by the record. *See* Code § 20-107.1. We find no abuse of discretion, and affirm the awards. *See Huger v. Huger*, 16 Va. App. 785, 791, 433 S.E.2d 255, 259 (1993). *See also Thomasson v. Thomasson*, 225 Va. 394, 397 n.1, 302 S.E.2d 63, 65 n.1 (1983) (permitting trial court to reserve power to modify spousal support).

V. CUSTODY AND VISITATION

Dr. Fox contends that the trial court erred in its custody and visitation determinations.

"In matters of custody, visitation, and related child care issues, the court's paramount concern is always the best interests of the child." *Farley v. Farley*, 9 Va. App. 326, 327-28, 387 S.E.2d 794, 795 (1990). On review, "the 'decision of the trial judge is peculiarly entitled to respect for he saw the parties, heard the witnesses testify

and was in closer touch with the situation than the [appellate] Court, which is limited to a review of the written record.'" *Sutherland v. Sutherland*, 14 Va. App. 42, 44, 414 S.E.2d 617, 618 (1992) (citation omitted).

The trial court saw the parties and heard the evidence. Having reviewed the record, we find that it supports the decision to award Ms. Fox custody of the parties' children and to deny visitation to Dr. Fox.

Dr. Fox contends also that the trial court erred in entering child visitation orders without the notice to and endorsement by his counsel and the guardian *ad litem*.

Rule 1:13 provides that:

> Drafts of orders and decrees shall be endorsed by counsel of record, or reasonable notice of the time and place of presenting such drafts together with copies thereof shall be served by delivering or mailing to all counsel of record who have not endorsed them. *Compliance with this rule . . . may be modified or dispensed with by the court in its discretion.*

(Emphasis added).

All counsel of record, including the guardian *ad litem*, were present at the trial. Counsel for Dr. Fox was not permitted to participate and the guardian *ad litem* declined the trial court's repeated offer to examine the witnesses. Counsel for Dr. Fox objected to his exclusion from participation and to the trial court's findings and rulings. At the conclusion of the trial, the trial court requested findings of facts and conclusions of law from Ms. Fox. Her counsel gave notice that the proposed findings and conclusions of law would be submitted forthwith. *See State Hwy. Comm'r v. Easley*, 215 Va. 197, 201, 207 S.E.2d 870, 873 (1974) (noting that rule designed to protect parties without notice).

"All that remained to be done was the preparation and entry of the [decree] to end the case in the trial court."

Davis v. Mullins, 251 Va. 141, 148, 466 S.E.2d 90, 93 (1996). Ms. Fox's counsel sent a facsimile and mailed a copy of the proposed findings to all counsel of record. The trial court entered the final decree of divorce that same day. Following entry of the final decree, neither counsel for Dr. Fox nor the guardian *ad litem* requested an opportunity to endorse the final decree.

We hold that, under the circumstances of this case, the trial court did not abuse its discretion in dispensing with the requirement that the final decree be endorsed by all counsel of record. *Compare Smith v. Stanaway*, 242 Va. 286, 289, 410 S.E.2d 610, 612 (1991), *with Cofer v. Cofer*, 205 Va. 834, 836, 140 S.E.2d 663, 665 (1965) (reversing order entered without notice that adversely affected rights of infants).

VI. MONETARY AWARD OF MARITAL ASSETS

Dr. Fox contends that the trial court abused its discretion in the determination and award of marital assets. Despite having presented us with a question on appeal, Dr. Fox has advanced no argument thereon. We will not construct an argument for him. Accordingly, we do not address this question. *See Fitzgerald v. Bass*, 6 Va. App. 38, 56 n.7, 366 S.E.2d 615, 625 n.7 (1988).

VII. JURISDICTION OVER NON-PARTIES

Dr. Fox contends that the trial court erred in exercising subject matter jurisdiction over certain trusts established for the parties' children and over various other entities.

> [T]he court, upon request of either party, shall determine the legal title as between the parties, and the ownership and value of all property, real or personal, tangible or intangible, of the parties . . . .

Code § 20-107.3.

> Virginia's statute "mandates" that trial courts determine the ownership and value of all real and personal property of the parties. But, consistent with established Virginia jurisprudence, the litigants have the burden to present evidence sufficient for the court to discharge its duty.
>
> * * * *
>
> Adequate discovery techniques are available to the parties to enable them to obtain evidence to identify, classify or evaluate marital or separate property. The court has available and should exercise adequate sanctions to deal with the reluctant or recalcitrant party or witness who fails or refuses to disclose relevant evidence.

Bowers v. Bowers, 4 Va. App. 610, 617-18, 359 S.E.2d 546, 550-51 (1987) (citation omitted).

While Dr. Fox argues that the trial court lacked subject matter jurisdiction to identify and value assets held by him and by the patries' children, he provides us no authority for that proposition. Nor does he argue that the non-parties objected to participation. Because of Dr. Fox's obstreperous conduct in refusing to comply with discovery orders, the trial court properly sought the direct assistance of non-parties to enable it to discharge its duties under the statute.

Dr. Fox also appears to contend that the trial court erred in finding that various entities were, in fact, his alter egos. He advances no argument to support this contention, and we will construct none for him on appeal. However, we note that:

> "[W]hen a corporation will be regarded as the adjunct, creature, instrumentality, device, stooge, or dummy of another corporation is usually held to be a question of fact in each case. * * *; and courts will disregard the separate legal identities of the corporation only when one is used to defeat public

> conveninece, justify wrongs, protect fraud or crime of the other."
>
> * * * *
>
> "Notwithstanding, when the facts justify it, the courts will look beyond the mere corporate entity to the persons who compose the corporation."

Lewis Trucking Corp. v. Commonwealth, 207 Va. 23, 31-32, 147 S.E.2d 747, 753 (1966) (citations omitted).

The trial court found that Dr. Fox "embarked upon a scheme to defraud both [Ms. Fox] and the taxpayers of this jurisdiction through the use of a series of limited partnerships, trusts and corporations which in reality are simply an attempt by [Dr. Fox] to fraudulently hide marital assets and prevent their proper distribution." The record supports the trial court's determination that the various entities and Dr. Fox shared a unity of interest and ownership, such that their separate personalities no longer existed. *See* 18 Am. Jur. 2d *Corporations* § 45. *See also* 62B Am. Jur. 2d *Process* § 284 (noting the exception to the general rule that a corporation is subject to service of process where the corporation served is the alter ego of the defendant).

We affirm the trial court.

VIII. AWARD OF ATTORNEYS' FEES AND COSTS

Dr. Fox contends that the trial court abused its discretion in the award of attorneys' fees and costs.

"An award of attorney's fees is a matter submitted to the trial court's sound discretion and is reviewable on appeal only for an abuse of discretion." *Graves v. Graves*, 4 Va. App. 326, 333, 357 S.E.2d 554, 558 (1987).

On April 30, 1997, the trial court entered judgment against Dr. Fox for Ms. Fox's attorneys' fees and costs in the amount of $203,260.77. The trial court found that:

> [B]ecause of [Dr. Fox's] extreme behavior and continuing direct contempt of the Court's orders, and [Dr. Fox's] nearly complete lack of cooperation in providing discovery, including his intentional and actual efforts to impede discovery, [Ms. Fox] has been required to expend extraordinary and excessive amounts of money on attorneys' fees and costs . . . ."

Under the circumstances, the award was appropriate. We find no abuse of discretion.

IX. WRIT OF NE EXEAT

Dr. Fox contends that the evidence does not support a finding that he was in Virginia when the trial court entered and subsequently amended the writ of *ne exeat*. He argues that the writ cannot restrain the departure of one who has already left.

A writ of *ne exeat*:

> [F]orbids the person to whom it is addressed to leave the country, the state, or the jurisdiction of the court. Available in some cases to keep a defendant within the reach of the court's process, where the ends of justice would be frustrated if he should escape from the jurisdiction.

Black's Law Dictionary 929 (5th ed. 1979). The writ is a proceeding in equity to secure bail. It may not be granted unless: (1) a debt for a sum certain is due; (2) it is an equitable demand without recourse at law, except as "in account, and some other cases of concurrent jurisdiction"; and (3) the person to whom the writ is addressed is about to "quit[] the Country." *Rhodes v. Cousins*, 27 Va. (6 Rand.) 657, 659 (1828).

Ms. Fox sought the writ and submitted an affidavit incorporating by reference the statements in her petition. She averred that Dr. Fox had not paid certain child and spousal support obligations and that the parties' children's trust account funds ($341,253.90) had been removed in

contravention of a prior order. She also averred that she believed that Dr. Fox was preparing to relocate to the Bahamas. She testified as to the basis for that belief.

After a hearing on the petition, the trial court entered the writ, directing the sheriff to restrain Dr. Fox's departure from Virginia, with bail set at $400,000. In the final decree, the trial court increased the amount of bail to $1,000,000.

The evidence, viewed in the light most favorable to Ms. Fox, supported the finding that Dr. Fox was preparing to leave the United States permanently. However, the record does not reflect that at the time the trial court issued the writ, Dr. Fox was present in Virginia.

Because of its potential to restrict a person's liberty, the writ of *ne exeat* merits close judicial scrutiny. Execution of the writ is akin to a prohibitory injunction. It restrains the departure of a person from the jurisdiction of the court so as to prevent irreparable harm. Here, the writ sought to secure performance of the trial court's decrees and to ensure that Dr. Fox would provide for his former wife and their minor children.

The circumstances in this case support the trial court's amendment of the writ in the final decree of divorce. Dr. Fox alleges no prejudice. At no time has he been forced to give bail to secure his liberty. He has not moved the trial court to quash the writ. The amendment serves merely to balance the equities and to offer Ms. Fox and the parties' children a mechanism by which they may seek to bar Dr. Fox's escape from Virginia upon a subsequent return. We find no abuse of discreiton in increasing the amount of bail.

X. MOTION TO RECUSE

Dr. Fox contends that the trial judge erred in declining to recuse himself. We disagree.

While stating that Dr. Fox had very low credibility, the trial court told Dr. Fox's counsel that:

> Every time he comes into this courtroom . . . as far as I'm concerned, Dr. Fox starts off with a clean slate, but everything that I have seen about Dr. Fox at this point is totally unworthy of belief.

In discussing experts, the trial court stated:

> Well, Dr. Fox can hire anyone that he wants. And I will give due consideration to the credentials and testimony of any expert that he brings in here.
>
> I will not—I will not prejudge anyone, but I do reserve the right to call them as I see them after I hear their credentials and after I hear them testify.

"It is within the trial judge's discretion to determine whether he harbors bias or prejudice which will impair his ability to give the defendant a fair trial." *Terrell v. Commonwealth*, 12 Va. App. 285, 293, 403 S.E.2d 387, 391 (1991) (citation omitted). Having reviewed the record, we cannot say that the trial judge abused his discretion in declining to recuse himself.

Affirmed.

APPENDIX E

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 3rd day of June, 1998.

Record No. 980980
Court of Appeals Nos. 0721-97-4
and 1094-97-4

KENNETH R. FOX,

Appellant,

against

WENDY R. FOX,

Appellee.

From the Court of Appeals of Virginia

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:14(a).

A Copy,

Teste:

DAVID B. BEACH
Clerk

By /s/ Jennifer G. Earle
Deputy Clerk

APPENDIX F

[Filed Jun. 9, 1997]

VIRGINIA:

IN THE CIRCUIT COURT
OF ARLINGTON COUNTY

Chancery No. 96-80

KENNETH R. FOX,
Complainant/
Cross-defendant,

-vs-

WENDY R. FOX,
Defendant/
Cross-complainant.

Arlington Courthouse
Monday, April 7, 1997

The above-entitled cause came on for hearing before THE HONORABLE ALFRED D. SWERSKY, Judge, in and for the Circuit Court for Arlington County, Virginia, at 10:30 a.m.

[2]

Counsel for the Complainant/Cross-defendant:

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Guardian Ad Litem:

RICHARD J. MCCUE, ESQUIRE
705 Park Avenue
Falls Church, Virginia 22046
(703) 536-7971

* * * *

[4] PROCEEDINGS

(Five witnesses were sworn.)

THE COURT: Mr. Garver, the record will reflect your continuous objection. Have a seat and make yourself comfortable.

Mr. Rucker, do you want to make an opening statement?

MR. GARVER: Your Honor, may I ask you, it's my understanding that my objection is continuing on the grounds set forth before?

THE COURT: Yes, sir.

MR. GARVER: And do I also understand that I am prohibited from making proffers to the Court?

THE COURT: Yes, sir.

MR. RUCKER: Your Honor, the first order of business might be, to save Mr. McCue some time, we have

an order that has been endorsed by the trustee, Mr. Shoemaker, signed over to Mr. McCue.

MR. McCUE: This order has been endorsed by all the parties including Mr. Shoemaker who is the trustee of the children's trust. He has [5] agreed to resign as trustee.

THE COURT: The order is entered, Mr. McCue.

MR. RUCKER: May it please the Court, the way we would like to proceed, if the Court is agreeable, is initially to put on the fault grounds for the divorce and get all the facts and therefore we will release a number of people.

THE COURT: Call your first witness.

MR. RUCKER: It's my understanding that Mr. Stephen Friedman, who has been moved in pro hac vice, will conduct the equitable distribution support side of this case, I will conduct the fault grounds. And there will be a number of stipulations and proffers of evidence that will expedite this matter.

So if Your Honor is ready, I will call my first witness. I call Officer Ahn.

[6] Whereupon,

OFFICER KEITH AHN,

was called as a witness by and in behalf of defendant and after having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. RUCKER:

Q Would you please state your name, sir?

A Officer Keith Ahn.

Q Officer Ahn, how long have you been an Arlington County police officer?

A About six and a half years.

Q Were you so employed September 24, 1995?

A Yes, I was.

Q On or about that date, did you have an occasion to see Mrs. Wendy Fox?

A Yes, I did.

Q Can you tell the Court under what circumstances you saw her?

A I was going to the station to take some photography of the wound that she had received from the domestic violence that happened.

[7] MR. RUCKER: Your Honor, if I may approach?

THE COURT: Yes, sir.

MR. RUCKER: I would like to have these marked as Defendant's Exhibit Number 1A and 1B.

(The documents were marked as Defendant's Exhibit Nos. 1A, 1B for identification.)

BY MR. RUCKER:

Q Officer Ahn, I will ask you to look at what has been marked as Defendant's 1A and 1B and ask you if you can identify them?

A These are the photographs that I took that day.

Q Do these photographs accurately and truly reflect the condition that you saw on Mrs. Fox on that day?

A Yes, it does.

MR. RUCKER: Your Honor, I move these into evidence.

THE COURT: 1A and 1B are admitted

[8] (The documents previously marked for identification as Defendant's Exhibit No. 1A and 1B were received in evidence.)

MR. RUCKER: I have no further questions.

(Witness excused).

THE COURT: Who is your next witness?

MR. RUCKER: I call Ms. Fox.

MR. GARVER: Just to clarify, it's my understanding we are prohibited from objecting throughout?

THE COURT: You have no standing. One objection now that you have already made covers everything. All you should do is make yourself comfortable and listen.

Unless Mr. Fox shows up, then by all means we can change the rules. But until he does, you can be seen and not heard.

* * * *

APPENDIX G

VIRGINIA:

IN THE CIRCUIT COURT
FOR ARLINGTON COUNTY

Chancery No. 96-80

KENNETH R. FOX,
Complainant/
Cross-Defendant

vs.

WENDY R. FOX,
Defendant/
Cross-Complainant

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT OF ABSOLUTE DIVORCE AND MONETARY AWARD

UPON CONSIDERATION of the Parties' Cross-Complaints for Absolute Divorce, in accordance with Domestic Relations § 20-107 of the Code of Virginia, which came before the Court for trial on April 7, 1997, and the Court having heard the testimony of the Cross-Complainant and, pursuant to the agreement of counsel, received testimony and evidence based upon the stipulated proffer of expert testimony of Richard Barsky, C.P.A., John Jarosz, patent appraiser, and the witnesses Jacqueline Homan, Joan Neiman, Dr. Arthur Coster, Clifford Shoemaker, Esq. and Howard Seal, C.P.A., all of whom were either in Court or scheduled to appear pursuant to subpoena, and having received and reviewed the evidence, and after carefully reviewing the record of these proceed-

ings, and the applicable law, hereby makes the following findings of fact:

1. That the Court has carefully reviewed the factors set forth in Domestic Relations, § 20-107.3(3)(E) and after listening to the testimony; reviewing the evidence, and identifying the marital property and assigning the value thereof as set forth on Defendant's Exhibit 5, entitled Marital Property Worksheet, hereby make the following findings:

(a) That the parties have been married for 21 years.

(b) That both parties are in good health and neither is under any disability or incapacity.

(c) That the circumstances and factors which contributed to and caused the estrangement of the parties and the dissolution of the marriage were the Complainant's cruel and brutal treatment of the Defendant, said cruelty and brutality including physically and verbally abusing her generally throughout the marriage and culminating in two serious beating in March and September of 1995, and the Complainant's removal from the family home and subsequent guilty finding for beating and assaulting the Defendant as a result of the September, 1995 incident. The aforesaid conduct by the Complainant is sufficient to grant a divorce to the Defendant in accordance with Domestic Relations § 20-91(6) and 20-95, Code of Virginia. The parties have lived separate and apart, continuously and uninterruptedly since October 5, 1995, without cohabitation and without any hope or expectation of a reconciliation.

(d) That the debts and liabilities of the Defendant are as listed on her financial statement in evidence and the Plaintiff's are unknown since he has refused to produce a financial statement or provide discovery.

(e) That all of the items on the Marital Property Worksheet are marital property, having been acquired by

the parties during the marriage and not having been received by gift or inheritance, nor have they been excluded or resolved pursuant to an agreement between the parties. All of the aforesaid property has been acquired as a result of the joint efforts and endeavors of the parties, with the Defendant always working and turning control of her paycheck over to the Complainant and through the efforts of the Complainant insofar as earning income from his medical practice and various business ventures. The family's finances were always under the complete control and domination of the Complainant and he was solely responsible for investing the family's assets and funds.

(f) Other than the family home, all of the items of marital property which the Defendant has been able to identify, with the exclusion of the patents, are generally liquid. The marital home is in foreclosure as a result of the Complainant's failure to pay the Court-ordered mortgage payments, and it appears that there is no equity therein, the property having been refinanced at the direction of the Complainant and there being no evidence or trace of where he has deposited the proceeds from the refinancing of the marital home.

(g) Due to the Complainant's refusal to disclose marital property, it is difficult to determine the tax consequences to each party. The Court is aware that the Complainant has failed to make his quarterly tax payments and the Defendant has now been left to face the consequences, which include a $7,500 lien plus interest from December 31, 1996, by the Internal Revenue Service on her paycheck and checking account.

2. Other factors:

a. Counsel Fees: The Complainant has repeatedly defied this Court's orders concerning discovery, child and spousal support; the freezing of marital assets; the Writ *Ne Exeat* forbidding him to leave the jurisdiction, and he has actively attempted to thwart and complicate discovery

efforts to determine the extent and identitfy of marital property. He has carefully removed documents from his accountant and others so as to conceal the whereabouts of the marital assets. He has laundered his support payments, when he has made them, through his counsel's office so as to hide the source of the funds. He has instructed holders of documents and information not to turn them over to the Defendant's counsel. He has hired counsel for his employees so as to avoid turning over documents which has prevented the Defendant from locating assets. Ms. Homan was subpoenaed to produce documents and when she refused to comply, her/Dr. Fox's attorney, agreed to hold the documents pending further order of this Court to require her to comply. During this period of time, in violation of the agreement, he ordered her to leave the documents on a desk in the office and he then had another agent take them and spirit them out of the United States to his refuge in the Bahamas. he liquidated over $650,000 in assets from the Fox Family I Limited Partnership by the end of 1995, and confessed to his trustee, Clifford Shoemaker, Esquire that he "spent" another $450,000 during 1996, all without a trace.

The Defendant has thus had to undertake extraordinary discovery efforts, including repeated orders by this Court, to obtain documents from the Complainant's accountants, both in Virginia and in Florida; from his patent-partner, Dr. Arthur Coster; from his patent attorney, George Myers, Esquire; and from the children's trustee, Clifford Shoemaker, Esquire. All of these documents and information were in the Complainant's possession and under his control and he did everything within his power to frustrate discovery and avoid turning these items over or allow others to do so.

He has brought trumped up criminal charges against the Defendant in the District of Columbia which caused the Defendant and the minor children incalculable humiliation. He has sued the Defendant in the District of

Columbia for both a divorce and for assaulting him and defaming his character, both allegations being laughable given the findings herein concerning the Complainant's conduct. These frivolous and vexatious cases have caused the Defendant to spend tens of thousands of dollars in successfully defending herself.

Given the Complainant's very substantial income and the Defendant's modest income thereof, and the unreasonable necessity of the expenditures which she has had to make to obtain the most basic discovery materials, and the fact that she has had to expend funds to obtain support and mortgage payments, she is entitled to have the Complainant pay her entire legal, accounting and patent valuation bills. The Court will defer judgment thereon for a further inquiry on the amount and reasonableness of these expenditures under the circumstances.

b. Monetary Award: The Court finds that the Complainant has marital property, including an interest in patents and licensing agreements through the Interstate Limited Partnership, titled in his own name and secreted in his various trusts, corporations and partnerships (all of which are marital property (which is valued conservatively at $1,900,000 as of the date of the parties' separation, and a retirement plan presently valued at $1,000,000. Given the Complainant's refusal to allow or provide discovery, the evidence and expert testimony presented at trial, it is the Court's opinion that these valuations could actually be twice this amount, but these are the actual amounts which could be verified and the Court will not speculate beyond these values.

The only jointly held property is the family home and the furnture and personal property located therein. The Complainant has taken items of personal property in direct violation of the Order of the Juvenile and Domestic Relations Court and these items have been listed on Defendant's Exhibit 3. The jointly titled family home, which

has no equity, is in foreclosure and will need to be vacated by the Defendant and the minor children within the next 60 days.

The Court further finds that it would be inequitable and unfair to allow the Complainant to retain virtually all of the marital assets by title and thus, after considering the factors above, finds that an equitable division of the Complainant's marital assets is appropriate and shall be so ordered, i.e., $1,980,000 in *marital* assets, as well as $1,000,000 in his retirement fund.

c. Specific assets: The Court finds as a fact that the Complainant has embarked upon a scheme to defraud both the Defendant and the taxpayers of this jurisdiction through the use of a series of limited partnerships, trusts and corporations which in reality are simply an attempt by the Complainnant to fraudulently hide marital assets and prevent their distribution. He has used these entities as he sees fit and has not respected their integrity, either in form or substance. When he wants to liquidate them or transfer the entity's assets, he does so at his sole discretion. When he wants to secret marital assets, he simply transfers them to or among his various entities. When he wants to remove an owner of an asset, he does so with impunity. He is so closely allied with these entities, through his ownership and sole management, that the corporate, partnership and trust entities are simply a sham, and it is Dr. Fox himself who is doing business behind the corporate/trust/partnership shield.

The Court finds that Dr. Fox's intent and actual conduct is such that he has blurred and essentially eradicated the separation between himself and these entities and that the entities are mere agents which are subservient to him. He has violated the most basic rules of maintaining his interests separate and apart from these entities. He has consistently allowed his personal interests to be substituted for his duty to treat these entities as separate and distinct

from himself. He has repeatedly reaped private profit and advantage from his official positions and used the funds of these entities for his own personal gain. He has consistently conducted himself in such a way, and with the specific intent, so as to abuse, ignore and intentionally waive his status as a person who is actually and formally distinct from the entities he represents. The Court therefore finds as a fact that Kenneth R. Fox, M.D.P.C., Fox Family I Limited Partnership, Fox Family II Limited Partnership, PILLCO Limited Partnership, INTERLASE Limited Partnership, Kenneth R. Fox Trust Deed, 5/1/79 as amended, Fox Inheritance Limited Partnership, K.K.D. Enterprises, Inc., Health Enterprises Limited Partnership, the Consulting Group Limited, Inc., TransGlobal Technology, Intherea Limited Partnership, Ophthalmology Associates, US Forensic Consultants and any and all subsequent entities into which these entities or assets owned by these entities, and/or any of the family's assets may be titled, are null, void and to no effect, and that the assets belonging to these entities and any successor entities, including those directly traceable to any of these entities, shall be subject to levy and seizure so as to satisfy the monetary award judgment issued in favor of the Defendant hereinafter.

d. Custody: The Court finds that the Defendant is a fit and proper person to receive sole permanent legal and physical custody of the parties' two minor children, David E. Fox, and Kimberly A. Fox, and the Complainant shall have no rights of visitation until further order of this Court.

e. Support: The Court finds that the Defendant is entitled to indefinite alimony, and shall reserve jurisdiction to award the same until such time as the youngest child attains the age of 18, or 19, if he is still in high school. Pending an alimony award, the Complainant shall pay child support of $7,505.00 per month, and the children's private school tuition and other educational expenses shall be paid for from their respective trust funds.

The Court is structuring the child support and alimony in this fashion in view of the history of the Complainant in refusing to pay alimony. In accordance with Domestic Relations, § 20-113, Code of Virginia, the Court has consolidated the Complainant's child support and alimony awards, *pendente lite*. The Complainant is currently earning at least $295,000 per year in actual and imputed income (including income imputed to him as a result of leaving his employment in the local area and considering his questionable tax deductions in 1996) and probably much more. The Defendant now earns $41,000. The child support guidelines produce a child support obligation of the Complainant of $2,478 per month and the Fairfax alimony guidelines produce a $4,572 per month alimony obligation. Given the needs and expenses of the family, the gross disparity of income between the parties, and the standard of living to which the Defendant and the children have become accustomed, and the Court's conclusion that the applications of the guidelines in this particular case would be unjust and inappropriate, and that it would be in the children's best interest for the Court to deivate from the guidelines, with the Court considering the relevant evidence pertaining to the factors set forth in Domestic Relations section 20-108.1(B)(1)-(18), with factors 1, 2, 3, 6, 10, 11, 13 and 17 weighing heavily in the Defendant's favor and supporting an upward deviation from the guidelines, the Court will order that the Complainant pay unto the Defendant, $7,500 per month, effective and accounting from the date of this judgment, as and for child support. Absent this consolidation, it is the intention of this Court to award $2,478.00 per month in child support (in accordance with the child support guidelines) and $4,592.00 per month in indefinite alimony, for the joint lives of the parties or until the Defendant's remarriage, all subject to further modification in the event of a change in circumstances.

f. Arrearages: The Court finds that the Complainant is $39,066 in arrears in his child support and Court

ordered mortgage payments, in addition to the $24,979 arrearage which was previously reduced to judgment by this Court.

FINAL JUDGMENT

It is therefore, the Judgment of the Circuit Court for Arlington County, Virginia,

ORDERED, that the Complainant's Complaint be, and the same hereby is, dismissed as a result of his wanton and willful refusal to provide discovery and his continued refusal to abide by the orders of this Court, and it is further

ORDERED, that Defendant, Wendy R. Fox, be and she hereby is, awarded a judgment of absolute divorce from the Complainant, Kenneth R. Fox based upon cruelty of treatment pursuant to Domestic Relations § 20-91(6), Code of Virginia; and it is further

ORDERED, that the Defendant, Wendy R. Fox be, and she hereby is, awarded the sole permanent legal and physical custody of the parties' two minor children, David E. Fox, born November 19, 1983 and Kimberly A. Fox, born July 5, 1980, and the Complainant shall have no rights of visitation until further order of this Court, and it is further

ORDERED, that the previous protective order is hereby amended so as to require that the Complainant not to be in the presence or vicinity of the Defendant or the minor children until further order of the Court, and it is further

ORDERED, that the Defendant, Wendy R. Fox, is entitled to indefinite alimony for the joint lives of the parties or until her remarriage, and this Court shall reserve jurisdiction to award the same at such time as the youngest child attains the age of 18, or 19, if he is still in high school or at such other time as either party so requests or the child support awarded herein terminates for any reason. Pending an alimony award, the Com-

plainant shall continue to pay child support of $7,050.00 per month, effective and accounting from April 7, 1997, through the Child Support Enforcement Office of the Department of Social Services, and continue to pay the mortgage on the marital home as previously ordered until such time as the property is sold or the mortgage is otherwise curtailed through foreclosure, as well as any deficiency resulting from the aforesaid foreclosure. The children's private school tuition and other educational expenses shall be paid from their respective trust funds, it is further

ORDERED, that pursuant to § 20-60.3, Code of Virginia, the parties are hereby notified of the following provisions of Virginia law and the parties hereby represent to this Court that the information provided below is true information:

1. Support payments may be withheld as they become due pursuant to § 20-79.1 or § 20-79.2, from earnings as defined in § 63.1-250, without further amendments of this Order or having to file an application for services with the Department of Social Services.

2. Support payments may be withheld pursuant to Chapter 13 (§ 63.1-249, *et seq.*) of Title 63.1 without further amendments to the order upon application for service with the Department of Social Services.

3. A duty of support is owed for the following children of the parties:

Name	Date of Birth	Resides with
Kimberly Anne Fox	07-05-80	Mother
David Eric Fox	11-19-83	Mother

4. The following is true information regarding each parent of the child or children subject of this Order:

Complainant/Cross-Defendant: Kenneth R. Fox
Address: P.O. Box 13878, Nassau, Bahamas

Date of Birth: 04-20-47
SSN: 051-38-2522
Employer: Self-employed
Employer address: 3201 New Mexico Avenue, N.W., Suite 350, Washington, D.C. 20016

Defendant/Cross-Complainant: Wendy R. Fox
Address: 2716 N. Upshur Street, Arlington, VA 22207
Date of Birth: 07-03-51
SSN: 076-38-0088
Employer: Arlington County Public Schools
Employer Address: 1426 N. Quincy St., Arlington, VA 22207

5. A petition may be filed for the suspension of any license, certificate, registrations or other authorization to engage in a profession, trade, business or occupation issued by the Commonwealth of Virginia to a person responsible for support as provided in § 63.1-263.1, upon a delinquency for a period of ninety (90) days or more or in an amount of $5,000.00 or more.

(i) Kenneth R. Fox, M.D. presently holds a medical license, real estate brokers license, real estate agents license, and Virginia drivers license issued by Virginia.

6. The Order of this Court as to the amount and terms of the child support and spousal support are set forth in the support provisions of this Order.

7. This Order does not contain any provision for health care coverage for a spouse or dependent children.

8. The Order of this Court as to the amount and terms of any arrearages in support are set forth in the arrearage provision of this Order.

9. If support provided in this Order becomes payable through the Department of Social Services (DSS), the parties shall give each other and DSS at least thirty (30) days' advance written notice of any change in residence, and in addition,

10. The delinquent obligor shall inform DSS of the name and address of his/her current employer.

11. The separate amounts due to each person under this order for child support, and spousal support are set forth in the support provision of this Order.

Limited Partnership, the Consulting Group Limited, Inc., TransGlobal Technology, Intherea Limited Partnership, Ophthalmology Associates, US Forensic Consultants and any and all entities into which the family's assets or the assets of these entities may be transferred or titled, since the aforesaid entities are in fact fraudulent creations of the Complainant intended to illegally hide and secret his assets and the same are thus null and void, and it is further

ORDERED, that the Trustee of the Complainant's Retirement Fund be, and he/she hereby is, ordered and directed to roll over $500,000.00 of the aforesaid fund into an I.R.A. of the Defendant's choice, and at her direction, and this Court shall retain jurisdiction to issue a subsequent Order to effectuate the intent of this distribution if so required, and it is further

ORDERED, that the Complainant, Kenneth R. Fox, be and he hereby is, found to be in direct contempt of this Court's orders to pay mortgage and insurance on the marital home, child and spousal support, and any period of incarceration in the Arlington County Detention Center shall be deferred until the Complainant can be brought before the Court for a further hearing, or until he purges himself of contempt by paying the entire arrearages of $64,044.93, as well as any additional arrearages which may accrue, and it is further

ORDERED, that an additional judgment in the amount of $39,066.00 be and it hereby is, entered against the Complainant, Kenneth R. Fox, as and for additional child support and mortgage arrearages, and it is further

ORDERED, that Complaint, Kenneth R. Fox be, and hereby shall, pay *forthwith,* the entire balance on all Federal tax liens, and it is further,

ORDERED, that the Complaint shall, *forthwith,* return the items of personal property which he removed from the family home and his office, said items being fully itemized on Defendant's Exhibit 3, and it is further,

ORDERED, that the Writ of *Ne Exeat* be amended so as to increase the amount of the bond which the Complainant must post to $1,000,000 cash bond, so as to condition the return of sufficient marital property to this jurisdiction, and so as to satisfy the judgments entered herein in favor of the Defendant, all other terms of said Writ and instructions to the Sheriff to remain in full force and effect as the final order of this Court.

ENTERED this 9th day of April, 1997.

/s/ Benjamin Kendrick
BENJAMIN N.A. KENDRICK
Judge, Circuit Court for
Arlington County, VA

WE ASK FOR THIS:

RUCKER & RUCKER
Counsel for Defendant/Cross-Complainant
2009 North 14th Street, Suite 215
Arlington, Virginia 22201
(703) 525-4900
Bar #14357

By: /s/ Denman A. Rucker
DENMAN A. RUCKER

JOSEPH, GREENWALD & LAAKE, P.A.
Co-Counsel for DefendantCross-Complainant
6404 Ivy Lane, Suite 400
Greenbelt, MD 20770
(301) 220-2200

By: /s/ Stephen A. Friedman
STEPHEN A. FRIEDMAN

SEEN AND _____

STEVEN M. GARVER, ESQUIRE
Counsel for Complainant/Cross-Defendant
11702 Bowman Green Drive
Reston, VA
(703) 471-1090

APPENDIX H

VIRGINIA:

IN THE CIRCUIT COURT
FOR ARLINGTON COUNTY

Chancery No. 96-80

KENNETH R. FOX,
Complainant/
Cross-Defendant

v.

WENDY R. FOX,
Defendant/
Cross-Complainant

ORDER

THIS CAUSE came on to be heard this 16th day of August, 1996, and was argued by Counsel and upon consideration thereof, it is

ADJUDGED, ORDERED AND DECREED as follows:

1. Denied request of Philip Schwartz, Esq., Counsel for Kenneth Fox, to withdraw from further participation in this cause.

2. Denied request to have Steven Garver, Esq., substituted as Counsel for Kenneth Fox.

3. Rule to issue to Kenneth Fox for the following reasons:

A. Failure to pay spousal support as ordered by this Court.

B. Failure to provide accounting of minor's trusts as ordered by this Court.

C. Failure to provide discovery documents as ordered by this Court.

D. Failure to pay attorney fees as ordered by this Court.

4. Kenneth Fox shall not file any motions or pleadings in this Court until such time as he personally appears before this Court.

5. Kenneth Fox shall personally appear before this Court and tell the Court, if he can, why he should not be incarcerated for his failure to comply with the Orders of this Court.

6. Wendy Fox is awarded one thousand one hundred dollars ($1,100.00) as counsel fees for the preparation of the motions for August 16, 1996, and appearance of counsel on that date.

7. Entry of this Court's Order of July 19, 1996.

AND THIS CAUSE IS CONTINUED

ENTERED this 6th day of September, 1996.

/s/ Benjamin N. A. Kendrick
BENJAMIN N. A. KENDRICK
Judge

I ASK FOR THIS:

RUCKER & RUCKER
Counsel for Wendy Fox
2009 North 14th Street
Suite 215
Arlintgon, Virginia 22201
(703) 525-4900
BAR #14357

By /s/ Denman A. Rucker
DENMAN A. RUCKER

SEEN and _____

PHILIP SCHWARTZ, ESQ.
Counsel for Kenneth Fox